

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

VARSHASB T.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2011030772

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 7, 2011, in Culver City.

Varshasb T. (claimant) was not present; he was represented by his mother, Lida N.,¹ who used the services of a certified interpreter, Shahnaz Abrar.

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (WRC or Service Agency).

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on July 7, 2011.

ISSUE

Whether the Service Agency may reduce claimant's specialized supervision from 56 hours per month to 27 hours per month.

EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1-10.

¹ Initials and family titles are used to protect the privacy of claimant and his family.

Testimony: Lisa Basiri; Lida N.

FACTUAL FINDINGS

1. Claimant is a 7-year-old boy, born on January 23, 2004, who is a consumer of WRC based on his qualifying diagnosis of cerebral palsy. He has also been diagnosed with ataxia, unspecified intellectual disability, 25-week gestation, cerebral digenesis with cerebellar hypoplasia, corpus callosum thinning, brain stem atrophy, and global developmental delays.

2. Claimant lives at home with his parents. Claimant's father works full-time and his mother attends Santa Monica College part-time. Claimant attends Kenter Canyon Elementary School, where he is in a general education classroom with a one-on-one aide funded by the Los Angeles Unified School District. He also receives adapted physical education, occupational therapy (OT), and physical therapy (PT) from the school district.

3. Claimant has received Service Agency funding for specialized supervision services since 2009. Claimant's 2009 Individual Program Plan (IPP) was not submitted in evidence. A January 21, 2010, Purchase of Service (POS) Request, however, reflects that claimant was receiving funding for 20 hours per week, or 84 hours per month, of specialized supervision services, and was to continue to receive that level of funding from January 1, 2010, to May 31, 2010:

WRC previously approved 20 hours of Specialized Supervision based on financial hardship and mother's enrollment in school where she is learning English in order to advocate for her son.

[Claimant] requires total care as he is non-ambulatory. He requires assistance to move around his environment, eat, groom himself, and to dress. He tantrums and throws toys and objects at others. He has limited language.

[Claimant's] mother provides all 45 hours of IHSS per month herself. SC strongly supports request for 20 hours of Specialized Supervision until . . . 2/15/10 and 24 hours per week of Specialized Supervision until . . . 6/1/10.

(Ex. 10.)

4. A POS Review dated January 22, 2010, the day after the January 21, 2010, POS Request, reflects approval only of 27 hours per month of specialized supervision service, "after subtracting parental responsibility for a 5 yr. old of 57 hours. This volume of service is consistent w/ WRC service standards." (Ex. 10.)

5. A February 3, 2010, POS Request states that claimant was to continue to receive funding for 20 hours per week, or 84 hours per month, of specialized supervision services from January 1, 2010, to March 31, 2010. (Ex. 10.) Another February 3, 2010, POS Request states that claimant was then to receive funding for 56 hours per month of specialized supervision services from April 1, 2010, to February 28, 2011. The POS Request bears the annotation, “33% PR/L. Basiri.” Lisa Basiri, WRC’s Fair Hearing Coordinator, testified at hearing and explained that that annotation meant that the family was assessed at 33 per cent parental responsibility due to financial hardship, and thus received funding for 56 hours per month instead of 27 hours per month. (Ex. 10.)

6. No evidence was submitted to show that the information reflected in the POS Requests and the POS Review referenced above was communicated to claimant’s parents. Claimant’s February 12, 2010, IPP, however, reflects that claimant was to receive funding for 56 hours per month of specialized supervision services through Premier Healthcare Services until February 28, 2011. (Ex. 5.)

7. The same level of services is also reflected in claimant’s most recent IPP, dated January 14, 2011, which recites that the Service Agency is providing funding for 56 hours per month of specialized supervision for claimant through February 28, 2011, “at which time [claimant’s] annual IPP meeting will be held and her [*sic*] need for a continuation of specialized supervision services reassessed.” The January 14, 2011, IPP also reflects that the Service Agency funds 21 hours per month of in-home respite and five hours per month of behavioral intervention services, and that claimant receives monthly SSI benefits and more than 60 hours per month of In-Home Support Services (IHSS). The IPP reports that claimant “has issues with impulsivity, hyperactivity and a demanding nature . . . [Claimant] requires constant supervision to prevent injury.” He requires the assistance of a walker; he is not steady on his feet and falls frequently. He takes a long time to eat, so his parents feed him to save time. His parents assist him with toileting and dressing. (Ex. 4.)

8. On February 9, 2011, the Service Agency’s POS Committee met and decided to reduce claimant’s specialized supervision services from 56 hours per month to 27 hours per month. No evidence of the POS Committee’s calculations was submitted.

9. On February 25, 2011, the Service Agency sent a Notice of Proposed Action (NOPA) and a NOPA letter to claimant’s parents. In the NOPA, WRC notified claimant’s parents of its proposal to reduce specialized supervision services from 56 hours per month to 27 hours per month, effective February 9, 2011. The NOPA itself did not state any authority for its action, nor did it explain why the effective date of the funding reduction was retroactive to a date prior to the date set forth in the January 14, 2011, IPP. (Ex. 2.) In the NOPA letter, however, the Service Agency wrote that the reduction was being made in order to take into account “typical parental responsibility,” in accordance with WRC’s service standards. The letter stated that, when determining funding for specialized services, “. . . WRC may pay only the cost of care that exceeds the cost of normally providing care to a child without disabilities of the same age.” The letter further stated that “[t]he volume of

authorized funding is based on the CA Dept. of Education's survey of average childcare costs in LA County, enhanced by WRC for specialized care for your child." (Ex. 2.)

10. On March 8, 2011, claimant's parents submitted to WRC a Fair Hearing Request on claimant's behalf, appealing the proposed reduction in funding. (Ex. 2.)

11. In a letter to claimant's parents dated March 29, 2011, Mary E. Rollins of WRC wrote that, after meeting with claimant's parents on March 25, 2011, she had decided to uphold the Service Agency's decision to reduce funding for specialized supervision to 27 hours per month, effective April 1, 2011. Ms. Rollins wrote that:

This decision takes into account for [sic] 84 hours per month of specialized supervision of which parents are responsible for 57 of those hours as normal child care. This is based on the Los Angeles County's schedule of child care cost. I reviewed your financial information you do not qualify for financial hardship. [Claimant] is being funded for 70 hours per month of In-Home Support Services for which you have elected to be the provider.

(Ex. 3.)

12. WRC has continued to fund 56 or 57 hours of specialized supervision per month—the evidence is unclear as to which figure is correct—pending the decision in this matter.

13. Ms. Basiri testified that, because claimant's family no longer qualifies for financial hardship assistance, claimant's parents are responsible for 57 hours of the 84 hours per month requested, and the Service Agency will fund the remaining 27 hours per month. Ms. Basiri testified that the Service Agency was using California Department of Education (DOE) reimbursement ceilings for subsidized child care to calculate the amount of funding and the number of hours to provide, and the number of hours to be attributed to typical parental responsibility. Ms. Basiri testified that the Service Agency provides a higher level of funding than the DOE reimbursement ceilings. The Service Agency pays \$13.22 per hour to Premier Healthcare, of which \$8.57 is paid to the person providing the service. This is higher than the reimbursement ceiling of \$8.55 per hour for part-time child care centers in Los Angeles County. (Exs. 9, 10.)

14. Evidence of the DOE reimbursement ceilings reflects a part-time monthly ceiling of \$385.74 for child care centers in Los Angeles County. (Ex. 9.) At the top hourly rate of \$8.55, this represents just over 45 hours per month. At the hourly rate of \$13.22, which the Service Agency pays to Premier Healthcare, the DOE monthly ceiling represents just over 29 hours per month.

15. Claimant's mother testified that claimant requires constant supervision to avoid injury; he is wobbly and falls frequently, and often hits his head. He requires more than three hours to eat a meal, and acts like a much younger child. Claimant's mother testified that even 56 hours per month of specialized supervision is insufficient. Claimant's mother attends school at Santa Monica Community College, and plans to transfer her units to a four-year college. Her husband works full-time.

DISCUSSION

Jurisdiction and Burden of Proof

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.)² An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) Claimant's parents requested a fair hearing to appeal the Service Agency's proposed reduction of funding for claimant's specialized supervision. Jurisdiction in this case was thus established. (Factual Findings 9-11.)

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, the Service Agency seeks to change the level of services. Therefore, the Service Agency bears the burden of proving, by a preponderance of the evidence, that its decision to reduce funding for claimant's specialized supervision hours to 27 hours per month is correct. (Evid. Code, § 115.)

3. The Lanterman Act acknowledges the state's responsibility to provide services and supports for developmentally disabled individuals and their families. (§ 4501.) Regional centers, such as the Service Agency, play a critical role in the coordination and delivery of services and supports. (§ 4620 et seq.) Regional centers are responsible for developing and implementing IPPs, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (§§ 4646, 4646.5, 4647, and 4648.)

4. Sections 4512, subdivision (b), and 4685, subdivision (c)(1), provide, in pertinent part, that specialized supervision is among the services that may be provided to consumers and their families.³

5. When purchasing services and supports, a regional center must conform to its purchase-of-service guidelines. (4646.4, subd. (a)(1).) Those guidelines are to have been reviewed by the Department "to ensure compliance with statute and regulation." (§ 4434,

² Statutory citations are to the Welfare and Institutions Code, unless otherwise stated.

³ What is termed "specialized supervision" in this matter is identified in the Lanterman Act as "day care." The terms will be used interchangeably in this Decision.

subd. (d).) Reflecting the Department's interpretation of statute and regulation, guidelines are not entitled to the deference given to a regulation but are, rather, entitled to a degree of deference dependent upon the circumstances in which the agency has applied its expertise. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-15.)

6. The Service Agency in this case relied on its service standards regarding day care services to justify the proposed reduction in specialized supervision hours. According to WRC's service standards,

[d]ay care services are provided to school-aged children with a developmental disability while family caregivers are at work or attending a vocational/educational program leading to future work, and have no other means to provide care and supervision. . . . [They are] provided to those whose health and/or safety would be in jeopardy without such care because of the nature of their disability or at risk status.

(Ex. 7.)

7. The service standards state, in pertinent part, that:

Day care may be provided to those who meet all of the following criteria:

(1) Alternative resources for supervision have been ruled out;

(2) The individual resides in a . . . two-parent household with both parents working or attending a vocational/educational program full time;

(3) The person is in need of constant supervision or total support due to severe physical and/or medical challenges, or

(4) The individual has severe behavior challenges that constitute a threat to the health and safety of the individual, to the safety of others in the environment, or a threat to property;

(5) Other circumstances which the IPP team and Regional Center management deem qualify the individual for these services.

(Ex. 7.)

8. The service standards further provide that:

Normal parental responsibilities will be considered in determining eligibility for day care services. Under most circumstances, when funding day or after-school care services for a child under the age of 13, Westside Regional Center may pay only the cost of care that exceeds the cost of normally providing day/after-school care to a child without disabilities of the same age. The regional center may pay in excess of this amount *up to the vendored rate* when a family can demonstrate a financial need and when doing so will enable the child to remain in the family home.

(Ex. 7; italics in original.) The language about costs closely tracks the language of section 4685, subdivision (c)(6).

9. Applying its service standards, the Service Agency concluded that claimant's care and supervision needs exceed those of a child of the same age without disabilities to the extent that WRC funding for 27 hours per month of specialized supervision is appropriate. While the Service Agency did provide some evidence that a reduction in funding for specialized supervision services may be appropriate, it did not provide evidence sufficient to demonstrate that 27 hours per month is the appropriate level of services to be funded. This figure does not appear to correlate with the Service Agency's stated basis for determining the appropriate level of funding, i.e., the DOE reimbursement ceilings for child care centers in Los Angeles County, nor was any other evidence submitted to substantiate how the Service Agency arrived at that figure. There is no dispute that claimant continues to require and to be entitled to receive some level of regional center funding for specialized supervision services. (Factual Findings 1-15.) The Service Agency has, however, failed to meet its burden to demonstrate that the reduction of specialized supervision hours to 27 hours per month is justified.

LEGAL CONCLUSION

Cause was not established to reduce claimant's specialized supervision services from 56 hours per month to 27 hours per month. (Factual Findings 1-15, and Discussion.)

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ORDER

Claimant Varshasb T.'s appeal is granted. The Service Agency shall continue funding 56 hours per month of specialized supervision services for claimant until such time as a change is warranted as reflected in a new or updated IPP.

DATE: September 14, 2011

HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.